



ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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FEDERAL COMMUNICATIONS COMMISSION
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January 8, 2001

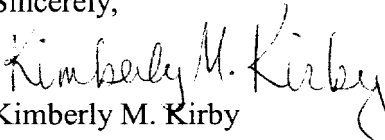
Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 00-217

Dear Ms. Salas:

Please find attached an original and four copies of the Association for Local Telecommunications Services' Comments on SWBT's ex parte filed December 28, 2000.

Sincerely,


Kimberly M. Kirby

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN - 8 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Joint Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services,)
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Kansas and Oklahoma)

CC Docket No. 00-217

COMMENTS OF
THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
ON SWBT'S DECEMBER 28, 2000 *EX PARTE* FILING

The Association For Local Telecommunications Services ("ALTS") submits these comments in response to the FCC's December 28, 2000 Public Notice seeking comment on an amended *ex parte* filed by SBC Communications, Inc. and its subsidiaries, Southwestern Bell Telephone Company's ("SWBT") and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, on December 28, 2000 ("*ex parte*") in the above referenced proceeding. The Commission issued a Public Notice seeking comments on SWBT's voluntary reductions in certain recurring and nonrecurring charges in Kansas and Oklahoma and the effect of the *ex parte* on SWBT's application for in-region interLATA relief pursuant to section 271 of the Telecommunications Act of 1934, as amended ("the Act").¹

¹ 47 U.S.C. § 271.

SUMMARY

ALTS filed Reply Comments in the above-captioned proceeding on December 11, 2000, urging the Commission to deny SWBT's application. In its reply comments ALTS stated that in addition to violating other section 271 requirements, SWBT failed to provide tangible information regarding cost-based rates. ALTS believes that the rate reductions filed in SWBT's December 28th *ex parte* should have no bearing on the proceeding and therefore ALTS maintains that SWBT's application should be denied.

In its December 28th *ex parte* filing, SWBT seeks to enter into the record new pricing data for recurring and non-recurring charges ("NRCs") for unbundled network elements ("UNEs") in Kansas and Oklahoma.² ALTS asks the Commission to disregard any of the information filed in the SWBT December 28th *ex parte* for the following reasons. First, the Commission has been consistent in its previous orders that a BOC section 271 filing must be complete as of the date filed. Second, there is no evidence that the initial rates filed by SWBT for recurring or non-recurring charges in this proceeding are based on cost as required by the Act. To make the assertion now -- several months into the statutory review period -- that certain rate reductions will be applied voluntarily in Oklahoma and Kansas is meaningless and would establish harmful precedent for future applications. In fact, any new rates, regardless of their validity, entered into the record at this late date should be disregarded by the Commission.

Specifically, SWBT seeks to apply a 25 percent discount to all UNE NRCs in Kansas as ordered by the Kansas Corporation Commission in its November 3, 2000 Order with certain conditions. In Oklahoma, SWBT seeks to offer alternative regulation

discounts to all cross-connect NRCs for the term of the O2A (section 271 interconnection agreements in Oklahoma) and an alternative regulation discount to any NRC that has not already received an alternative regulation discount. Further, SWBT proposes to limit the 25 percent discount in Oklahoma where those rates fall below the corresponding NRCs from Texas. With respect to recurring rates in Oklahoma, SWBT will apply the alternative regulation discounts to the recurring charges for all loops for the term of the O2A.

SWBT has failed to prove that these rates are based on TELRIC or that these rates will enable competitors to offer meaningful local service. Even if, for argument sake, the new discounts may provide competitors a meaningful opportunity to serve end users in Oklahoma and Kansas, the filing must be rejected based on the fact that SWBT failed to comply with the Commissions procedural rules.

I. SWBT FAILED TO COMPLY WITH THE COMMISSION'S PROCEDURAL RULES

The Commission has consistently stated that a BOC section 271 application, as originally filed, must include all factual evidence on which the applicant would have the Commission rely in making its findings.³ An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual

² See Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Magalie Roman Salas, Secretary, Federal Communications Commission, (December 28, 2000) (Klineberg Letter).

³ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-137 (August 19, 1997) (*Ameritech Michigan Order*), ¶ 26. *Application of Bell Atlantic Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) (*Verizon-New York Order*), ¶ 34. *Application of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of The Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 Memorandum Opinion and Order, (June 30, 2000)(SWBT-Texas Order), ¶ 35.

evidence that is not directly responsive to arguments raised by parties commenting on its application.⁴ Thus the Commission must disregard any factual information SWBT files subsequent to its October 26, 2000 filing where that information is not directly responsive to arguments raised by parties commenting on its application. The purpose of these procedural rules is to deter incomplete filings, lessen the already heavy burden on the parties and the FCC to render a decision within 90 days, and to prevent parties from chasing a “moving target” after the initial filing is made.⁵

Unlike the Department of Justice, the Commission, and SWBT’s opponents, SWBT can file a section 271 application *at any time*. There is no time constraint under which SWBT *must* file. On the other hand, all other parties must adhere to strict statutory deadlines set by the initial BOC filing. The Commission has stated that it is not feasible to expect the BOC to anticipate every argument its opponents may raise but certainly a BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. Clearly SWBT, or any BOC for that matter, cannot deny the significance of pricing. SWBT’s efforts to supplement the record at this late date is proof that SWBT did not take its initial filing seriously enough to put forth real, tangible pricing information.

In the past, when a BOC seeking section 271 authority has filed new or additional evidence not in direct response to another party, the Commission has chosen to disregard the information altogether.⁶ The Commission also has discretion to re-start the clock on any BOC application where it determines that a fresh start for all parties is the most

⁴ *Verizon-New York Order*, ¶ 34.

⁵ *Id.* at ¶ 35.

⁶ *Id.* at ¶¶ 38, 39.

reasonable and equitable approach to section 271 applications.⁷ Although ALTS believes that the Commission has the discretion to re-start the clock in this case, ALTS urges the Commission to disregard the newly filed information altogether.

A. SWBT Recent Rate Reduction Proposals Depend on Future Compliance

Even if the Commission chooses not to disregard the information filed in SWBT's December 28th *ex parte* based on procedural grounds, the Commission should disregard this information any way in that the new rates are useful only in determining whether the market *will be* competitive some time in the future.⁸ Since the rates have not gone into effect, CLECs have not been able to take advantage of the new prices thus it is premature to assume that the new prices will yield greater local competition in Oklahoma and Kansas.⁹ Furthermore, SWBT has submitted its rates under the alternative pricing regulation in Oklahoma as evidence of TELRIC-based rates. Because these rates are promotional, not permanent, they should not be considered in evaluating SWBT's compliance with section 271.¹⁰

Thus what SWBT is doing is nothing more than to promise future competition. The Commission has been very clear in finding that promises of future performance have no probative value in demonstrating the BOC's present compliance with the requirements

⁷ *Id.* at ¶ 34.

⁸ *Id.* at ¶ 37.

⁹ See Klineberg Letter at 2: "This offer will be set forth in an Accessible Letter by no later than January 5, 2001. The Accessible Letter will provide that the rates contained in these pricing amendments will take effect immediately upon approval by the appropriate state commission of either an O2A or K2A (or an amendment to an existing O2A or K2A) containing these new rates.

¹⁰ See Letter from Teresa K. Gaugler, Association of Local Telecommunications, to Magalie Roman Salas, Secretary, Federal Communications Commission, (December 21, 2000) (Gaugler Letter).

of section 271.¹¹ By supplementing the record with new rates for recurring and non-recurring charges, SWBT fails to support its application with actual evidence demonstrating its present compliance with the requirements of cost based rates in section 271. Rather, SWBT seeks to put on a show of good behavior with voluntary rate reductions that have not yet gone into effect. The Commission has no choice but to disregard such evidence as non-applicable in the current proceeding.

B. The New Evidence Does Not Rebut Factual Disputes

The Commission will allow new evidence if the sole purpose is to rebut factual disputes submitted by commenters and the new evidence covers the period of dispute by the other party.¹² There is no indication that SWBT is submitting this new data solely to rebut facts or clarify its position. Again, the only reason for SWBT's latest submission appears to be a last ditch attempt to comply with the pricing requirements of section 271. SWBT has had plenty of opportunity to comply with the pricing elements before it filed its application on October 26, 2000. Moreover, it does not appear that the supplemental filing comports in any way with the procedural ground rules set by the Commission in previous section 271 orders. And, although the Commission's procedural rules are discretionary, SWBT's filing does not appear to fall into any of the Commission's exceptions.

II. SWBT'S RATES ARE NOT BASED ON TELRIC

In addition to the procedural arguments set forth above, the Commission should disregard the new rate structure filed by SWBT in its December 28th *ex parte*. In its evaluation of SWBT's section 271 application, the Department of Justice disputed

¹¹ *Id* at ¶ 37.

¹² *Verizon-New York Order* at ¶ 34.

whether the rates for recurring and non-recurring charges in Oklahoma and Kansas were based on the Commission's methodology.¹³ The Department of Justice found that the recurring and non-recurring charges for the use of UNEs in Oklahoma, and the nonrecurring charges for UNEs in Kansas, were substantially higher than the comparable rates in Texas. In Texas, the Commission found similar rates to be based on cost whereas in Oklahoma and Kansas there is some indication that the prices were not determined in accordance with the Commission's methodological requirements.¹⁴

Based upon the Department of Justice evaluation, it is difficult to conclude that any rate reduction filed by SWBT that is not based on cost to begin with can comply with the requirements of section 271. Moreover, based on the steep 25 percent reductions filed by SWBT in its December 28th *ex parte* for Kansas, and the discounts off the alternative regulation rates for the recurring charges in Oklahoma, the Commission should be convinced that SWBT's initial application filed October 26, 2000 did not include cost-based rates. Thus it is logical to conclude that SWBT, by its December 28th *ex parte*, essentially admits that its initial section 271 application was not in compliance with the Act.¹⁵ Surely SWBT would not offer rates that are below what they are obligated to provide by law.

¹³ Evaluation of the United States Department of Justice, CC Docket 00-217, at 2 (filed December 4, 2000) (Department of Justice Evaluation).

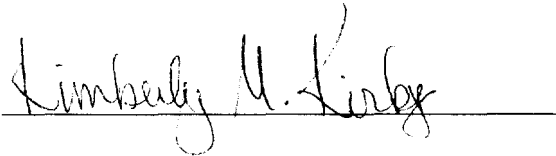
¹⁴ *Id.*

¹⁵ 47 U.S.C. § 271 (c)(1)(B)(ii). Section (ii) of the competitive checklist requires section 271 applicants to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1). Section 252(d)(1) states that "the just and reasonable rate for the interconnection of facilities and equipment...shall be...based on the cost...of providing the interconnection." *Id.* § 252(d)(1).

CONCLUSION

ALTS maintains its position that SWBT has not met its burden of proving section 271 compliance. The December 28th *ex parte* filing should be disregarded as violating the Commission's procedural rules in that SWBT seeks to supplement the record with critical cost data that could have been included in SWBT's initial filing. Given that SWBT has failed to prove compliance with Section 252(d)(1) of the Act, among other deficiencies, ALTS believes that the Commission should deny SWBT's application outright.

Respectfully submitted,

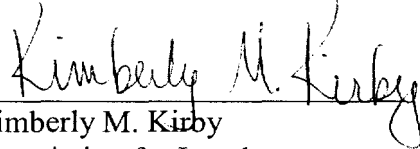
A handwritten signature in dark ink, reading "Kimberly M. Kirby", is written over a horizontal line.

Kimberly M. Kirby
Jonathan Askin
Association for Local Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202) 969-2587

January 8, 2001

CERTIFICATE OF SERVICE

I, Kimberly M. Kirby, do hereby certify that on this 8th day of January, 2001, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand delivery to the parties listed below.



Kimberly M. Kirby
Association for Local
Telecommunications Services

Magalie Roman Salas (Original + 4)
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

International Transcription Services, Inc.
445 12th Street, S.W.
Room CY-314
Washington, DC 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

Oklahoma Corporation Commission
2101 N. Lincoln Blvd.
Oklahoma City, OK 73152

U.S. Department of Justice
Antitrust Division, TTF
Attn: Layla Seirafi
1401 H St., N.W., Suite 8000
Washington, DC 20005

Rhonda Lien
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kathy Farroba
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Michelle Carey
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

James D. Ellis, Esq.
Paul M. Mancini, Esq.
Martin E. Grambow, Esq.
Kelly M. Murray, Esq.
Robert J. Gryzmala, Esq.
John Di Bene
SBC Communications, Inc.
175 E. Houston
San Antonio, TX 78205

Alfred G. Richter, Jr., Esq.
Southwestern Bell Telephone Company
175 E. Houston, Room 1250
San Antonio, TX 78205

April J. Rodewald, Esq.
Southwestern Bell Telephone Company
220 E. Sixth Street, Room 515
Topeka, KS 66606

Mary W. Marks, Esq.
800 North Harvey, Room 310
Oklahoma City, OK 73102

Michael K. Kellogg, Esq.
Geoffrey M. Klineberg, Esq.
Kellogg, Huber, Hansen, Todd & Evens,
P.L.L.C.
Sumner Square
1651 M Street, N.W.

Larry Cooper
SBC Communications, Inc.
4 Bell Plaza, Room 800
Dallas, TX 75202